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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B5

FILE:

SRC 05 054 51405

Office: TEXAS SERVICE CENTER

Date:

NOV 10 2005

IN RE:

Petitioner:

Beneficiary:


PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i). Every application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions (including where an application or petition should be filed). 8 C.F.R. § 103.2(a)(1).

The director issued the decision on May 5, 2005, and sent the denial notice to counsel's address of record. The director properly gave notice that the petitioner had 33 days to file the appeal. The notice reads, in pertinent part: "You may appeal this decision . . . by completing the enclosed Form I-290B (Notice of Appeal . . .) and filing it *with this office*" (emphasis added), i.e., the Texas Service Center. The instructions for Form I-290B indicate specify: "You must file your appeal with the U.S. Citizenship and Immigration Services (USCIS) office that made the unfavorable decision. . . . Do **not** send your appeal directly to the Administrative Appeals Office (AAO)."

Notwithstanding these instructions, the petitioner submitted the Form I-290B to the AAO in an envelope postmarked June 4, 2005. The AAO received the Form I-290B, and returned it to the petitioner because it had not been properly filed at the correct address. The director did not receive the appeal until June 27, 2005, 53 days after the decision was issued (along with instructions on where to file the appeal). Pursuant to 8 C.F.R. § 103.2(a)(1), the appeal was not considered "filed" until it arrived at the correct address. Accordingly, the appeal was untimely filed.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director erroneously annotated the appeal as timely and forwarded the matter to the AAO.

As the appeal was untimely filed, the appeal must be rejected.

ORDER: The appeal is rejected.